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MUHAMAD ZAFIR KAMIL v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
RHODZARIAH BUJANG JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
B [CRIMINAL APPEALS NO: A-05(M)-199-04-2018
& A-05(M)-200-04-2018]
27 MARCH 2019

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in cannabis – Allegation that accused persons were trafficking in cannabis wrapped in five slabs – Contradictory evidence on drug exhibits – Five slabs of cannabis examined and analysed by chemist – Photographs showed ten and not five slabs were seized by police – Nicks made by police on aluminium foil cover of slabs but chemist received 'nicely wrapped' slabs – Whether contradictions vitiated prosecution's case*
D *– Whether cannabis produced in court same cannabis seized from accused – Whether reasonable doubt raised on identity of drugs – Whether accused to be acquitted and discharged*

These were appeals by the appellants (otherwise Ipin and Aliff) against the decision of the Judicial Commissioner ('JC') convicting them of an offence
E under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 5029 grams of cannabis. It was the view of the JC, in so convicting the appellants and sentencing them to death, that they had committed the act of trafficking when they sought to sell five slabs of the offensive drugs – exhs. P6(A)ii, P6(B)ii, P6(C)ii, P6(D)ii and P6(E)ii – to PW2, the *agent*
F *provocateur*. It was the further view of the learned JC that the defences as put forth by the appellants, namely that they thought they were selling a stolen laptop, that Ipin was never at the crime scene and that Aliff was only an innocent carrier, were bereft of merits and ought to be altogether rejected. The convictions and the sentences notwithstanding, the facts as adduced
G before the JC also showed that while five slabs of cannabis were produced in court, photographs of the drugs in the appeal record showed not five but ten slabs of drugs were seized by the police. Contradictory evidence pertaining to the drug exhibits was also evident from the testimonies of the police officers ('PW5 and PW6'), and the chemist ('PW3'), where the former
H testified that nicks were made to the aluminium foil cover of the drug slabs before they were sent to PW3, while the latter affirmed and insisted that the drug slabs as received by him were all 'nicely wrapped'. It was thus that before the justices of appeal herein, upon the contradictions that had inflicted

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the evidence, the appellants argued that the JC's decision was unsustainable in law, that no case had been made out against them and that they ought instead to be acquitted and discharged.

Held (acquitting and discharging both accused persons)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) There was, from the respective roles played by Ipin and Aliff, the evidence of a pre-planned action which constituted the act of trafficking as defined in s. 2 DDA, *to wit* 'selling'. Nonetheless, they were acquitted on the following one issue which had rendered their convictions unsafe, *viz*. the issue of the identity of the drug exhibits. (paras 10 & 11)

(2) There was a genuine reason to doubt the identity of the drug exhibits produced. While it was the prosecution's case that five slabs were found in the bag brought by Aliff and handed over to Ipin and shown to PW2, photographs of the slabs of cannabis seized showed not five but ten slabs. Further, PW3's insistence that the packages were properly wrapped, particularly in respect of the aluminium foil, was very damning to the prosecution because it contradicted what was stated by PW5 and PW6 earlier. There was indeed a reasonable doubt raised as to whether the five drug exhibits were the very same slabs that were seized during the raid. (paras 12, 13, 15 & 16)

(3) On the authorities in *Sia Pang Liong v. PP* and *Yusri Pialmi v. PP*, the convictions of Ipin and Aliff had clearly been compromised. The appeals were allowed, the convictions and sentences were set aside and both the accused persons were acquitted and discharged. (paras 17-19)

Bahasa Malaysia *Headnotes*

Rayuan oleh perayu-perayu (iaitu Ipin dan Aliff) adalah terhadap keputusan Pesuruhjaya Kehakiman ('PK') mensabitkan mereka bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 5029 gram kanabis. Adalah menjadi pandangan PK, apabila mensabit perayu-perayu dan menjatuhkan hukuman mati terhadap mereka, bahawa perayu-perayu telah melakukan kesalahan mengedar bilamana mereka menjual lima ketulan dadah terlarang tersebut – eks.-eks. P6(A)ii, P6(B)ii, P6(C)ii, P6(D)ii dan P6(E)ii – kepada ejen perangkap PW2. PK selanjutnya berpandangan bahawa pembelaan seperti yang dikemukakan oleh perayu-perayu, iaitu bahawa mereka menyangka mereka menjual laptop curi, bahawa Ipin tidak pernah berada di tempat kejadian dan bahawa Aliff hanyalah seorang pembawa tidak bersalah, langsung tidak bermerit dan perlu ditolak sepenuhnya. Namun begitu, walaupun dengan pensabitan dan hukuman tersebut, fakta yang dibentang di hadapan PK juga menunjukkan bahawa, sementara lima ketulan

kanabis dikemukakan di mahkamah, gambar-gambar dadah di dalam rekod rayuan menunjukkan sepuluh ketulan dadah telah dirampas oleh pihak polis. Percanggahan dalam keterangan tentang ekshibit-ekshibit dadah juga terserlah daripada testimoni pegawai-pegawai polis ('PW5 dan PW6'), dan ahli kimia ('PW3'), di mana pihak terdahulu berkata bahawa torehan telah dibuat terhadap kertas penutup aluminium ketulan-ketulan dadah tersebut sebelum dihantar kepada PW3, sementara PW3 pula menegaskan bahawa ketulan-ketulan dadah yang diterima olehnya semuanya 'berbungkus rapi'. Makanya, di hadapan hakim-hakim rayuan di sini, berdasarkan percanggahan-percanggahan yang mencacat keterangan di atas, hujahan dibuat oleh perayu-perayu bahawa keputusan PK tidak boleh dipertahankan, bahawa tiada kes telah dibuktikan terhadap mereka dan bahawa mereka sewajarnya dilepas dan dibebaskan daripada pertuduhan.

Diputuskan (melepas dan membebaskan kedua-dua tertuduh)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan peranan yang dimainkan oleh Ipin dan Aliff masing-masing, terdapat bukti suatu tindakan yang dirancang yang menepati perbuatan mengedar seperti yang ditakrif bawah s. 2 ADB, iaitu perbuatan 'menjual'. Apa pun, perayu-perayu dibebaskan berdasarkan isu tunggal yang menjadikan sabitan mereka tidak selamat berikut, iaitu isu identiti ekshibit-ekshibit dadah.

(2) Terdapat alasan yang tulen untuk meragui identiti ekshibit-ekshibit dadah yang dikemukakan. Sementara ia menjadi kes pendakwaan bahawa lima ketulan dadah dijumpai di dalam beg yang dibawa Aliff yang kemudian diserah kepada Ipin dan ditunjuk kepada PW2, gambar-gambar ketulan kanabis menunjukkan bukan lima tetapi sepuluh ketulan. Selain itu, tegasan PW3 dalam pengataannya bahawa pakej-pakej telah dibaluti dengan rapi, terutama mengenai kertas aluminium, sangat menjejaskan kes pendakwaan kerana bertentangan dengan keterangan terdahulu PW5 dan PW6. Walau apa pun, keraguan munasabah telah berbangkit sama ada lima ekshibit dadah adalah ketulan-ketulan sama yang dirampas semasa serbuan.

(3) Berdasarkan autoriti kes *Sia Pang Liong v. PP* dan *Yusri Pialmi v. PP*, sabitan terhadap Ipin dan Aliff jelas telah dikompromi. Rayuan dibenarkan, sabitan dan hukuman diketepikan dan kedua-dua tertuduh dilepas dan dibebaskan.

Case(s) referred to:
Krishna Rao Gurumurthi v. PP & Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Sia Pang Liong v. PP [2012] 9 CLJ 848 FC ***(refd)***
Wan Mohd Azman Hassan v. PP [2010] 4 CLJ 529 FC ***(refd)***
Yusri Pialmi v. PP [2010] 6 CLJ 878 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), 40A(1)
Evidence Act 1950, s. 34

(Criminal Appeal No: A-05(M)-199-04-2018)
For the appellant - Ariff Azami Hussein; M/s Azizzul & Ariff
For the respondent - Mohamed Faizal Mohamed Fedder, Muhammad Azmi Mashud, Ku Hayati Ku Haron; DPPs

(Criminal Appeal No: A-05(M)-200-04-2018)
For the appellant - Mohamad Hafiz Jalaludin, Mohd Fitri Asmuni & Mohamad Salihen Mastor; M/s Alif, Hafiz & Partners
For the respondent - Mohamed Faizal Mohamed Fedder, Muhammad Azmi Mashud, Ku Hayati Ku Haron; DPPs

[Editor's note: For the High Court judgment, please see PP lwn. Muhamad Zafir Kamil & Satu Lagi [2018] 1 LNS 832 (overruled).]

Reported by Wan Sharif Ahmad

JUDGMENT

Rhodzariah Bujang JCA:

Introduction

[1] The appellants in these two appeals were jointly charged and convicted by the High Court for the offence of trafficking in 5029g of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and sentenced to death for it. The charge in Bahasa Malaysia reads as follows:

> Bahawa kamu bersama-sama, pada 7 Januari 2016 jam lebih kurang 3.30 pagi, di belakang Kedai Makan Restoren Tom Yam Kelapa Muda, No. 28, Hala Taman Meru 11, Taman meru 2B, Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah mengedar dadah berbahaya iaitu sejumlah 5029 gram Cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Gist Of Prosecution's Case

[2] The prosecution's case against the appellants was built on the evidence of PW2, an *agent provocateur* who, based on information received from his informer, contacted the appellant in Appeal No. A-05(M)-200-04-2018,

Muhamad Zafir bin Ramli (hereinafter referred to by his nickname as adduced at the trial, that is, Ipin) for the purchase of the drug. The price offered by Ipin was RM2,300 per kilogram.

[3] They both met at an arranged meeting place where the deal was set and on the appointed date, time and place, as in the charge, a second meeting for the delivery of 5kg of the drug was held. After Ipin was shown the money by PW2 behind a burger shop, he asked PW2 to follow him to a lane behind a Tomyam shop. At that location, the appellant in Appeal No. A-05(M)-199-04-2018, Mohamad Aliff bin Mohamed Alias (hereinafter referred to as Aliff) was also present. Ipin then directed Aliff to hand over a bag (exh. P5A) to him, which he then opened to show its content, which were the slabs of cannabis, to PW2. The pre-arranged signal by PW2 prompted the police raiding team present in the vicinity to swoop in on the two culprits.

Gist Of The Defence

[4] Ipin's testimony under oath was to deny that he was present at the scene. He said, at that material time, he was with a friend called Peh as well as Aliff in the latter's house. He then saw these two leaving the house and shortly thereafter, the police came to the house and arrested him as well as seized his handphone. The said handphone was found to be without any sim card. When he was brought out of the house, he saw that Peh and Aliff had also been arrested by the police.

[5] Aliff's defence, also given under oath, was that he chanced upon Ipin behind the Tomyam shop and was told by Ipin that he wanted to sell a stolen laptop to someone who would be coming shortly. He requested Aliff to get a bag with the stolen laptop from Peh's house. He did as was told and after handing over the bag to Ipin who was with PW2 then, Aliff left and not long after that he was arrested.

[6] It can be seen from the brief summary of both the defences that they were a denial of the commission of the offence. That of Ipin is even a notch higher – he was not even at the place of arrest and bordered on alibi. However that defence of his was impugned by that of Aliff who positively placed him at the scene of the crime and this fact was considered by the learned Judicial Commissioner when Her Ladyship concluded that defence of Ipin failed to raise any reasonable doubt on the prosecution's case. As for Aliff, she held that he was not an innocent carrier and was guilty of wilful blindness because he did not question Ipin about the content of the bag and there was no reason for the sale of the laptop to be made so early in the morning. The learned Judicial Commissioner also noted that Aliff struggled when he was arrested and this shows knowledge.

[7] Bearing in mind that this was a case of direct selling of the drug from the evidence of PW2 as the *agent provocateur* on the negotiation and the delivery of the same, it cannot be gainsaid that the defence of Ipin should not exculpate him from the charge. As was rightly raised by the learned Judicial Commissioner in her judgment, the Federal Court's decision in *Wan Mohd Azman Hassan v. Public Prosecutor* [2010] 4 CLJ 529 is that the evidence of an *agent provocateur* is one worthy of credit as provided under s. 40A(1) of the DDA, even though presuming that he is so is rebuttable by evidence to the contrary. We have to say that upon our scrutiny of the evidence, none can be taken to impinge on PW2's creditworthiness and his evidence on the negotiation and the sale remains intact. As for Aliff, it is a fact that the investigating officer (PW6) answered 'maybe' to the questions posed by learned counsel for Aliff that he had no knowledge of the content of the bag and thought it was a stolen laptop. This was how the questions were framed:

S: Saya cadangkan bahawa OKT2, tidak mempunyai pengetahuan tentang kandungan dalam beg tersebut

J: Mungkin.

S: Setuju, OKT2 menyangkakan bahawa dalam beg pink tersebut terdapat laptop curi

J: Mungkin.

[8] Against that evidence is the evidence of PW2, though disputed by Aliff, that he was present and standing in between Ipin and PW2 when the bag and its content was shown. It was also not disputed that Aliff never brought up the issue about the stolen laptop during the investigation of the case by PW6, DSP Mohd Syukry, although he was cross-examined on this at the trial which evidence we had just referred to above. We also need to mention that Aliff's counsel also put it to Ipin that Aliff told Ipin he was selling a stolen laptop and that the buyer would come shortly (see p. 129 lines 3844 to 3846 of appeal record vol. 2).

[9] Based on the role played by Aliff and if one were to discount the evidence of PW6 as reproduced above, there would indeed be no reason to say the learned Judicial Commissioner was wrong in dismissing his defence of an innocent carrier. However, that equivocal evidence of the PW6 which was never mentioned by the learned Judicial Commissioner in her judgment must, in fairness be construed in favour of Aliff for the benefit of the doubt expressed by no less than the officer tasked with the investigation of the case, must be given to him. Assuming we were wrong to say so, then from the role played by Aliff, one cannot deny that the circumstances were such that the ingredient of common intention under s. 34 of the Evidence Act 1950 had

A been fulfilled by Ipin negotiating the deal with PW2, and the said deal being set by the delivery of the drug by Aliff. As was held by the Federal Court in *Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 2 CLJ 603:

> The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of
B the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be
C taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.
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> D For a charge premised on common intention to succeed it is essential for the Prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s. 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

E **[10]** In other words, there was from the respective roles played by the two, evidence of a pre-planned action which constituted the act of trafficking as defined in s. 2 of the Act, *to wit*, 'selling'.

[11] Nonetheless, we had after hearing arguments on the appeal, decided
F to not just acquit Aliff but Ipin as well on this one issue which we are certain had rendered the convictions entered by the learned Judicial Commissioner unsafe.

Identity Of The Drug Exhibits

G **[12]** We reiterate that it is the prosecution's case that the five slabs of cannabis were found in the bag brought over by Aliff and handed over to Ipin which was shown to PW2. It was not disputed that five slabs of cannabis were produced in court as exhibits and marked as exh. P6(A)ii, P6(B)(ii), P6(C)(ii), P6(D)(ii) and P6E(ii) and they were the very same ones which were sent to the chemist (PW3) for analysis who confirmed that it was cannabis
H and of the weight as stated in the charge. PW6 also stated that the five slabs were marked and initialled by him after receipt from PW2, that they were in safe custody from then on until they were sent to, then returned by the chemist and until their production in court. However, what was disputed was

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whether these were the very same slabs seized at the time of the raid and we say that there was a reasonable doubt raised that this was not so for the following reasons.

[13] First, photographs of the slabs of cannabis seized (exh. P9(C) to (L) at pp. 10 to 14 of appeal record vol 3 shows in total ten slabs of cannabis – not five. Secondly, the evidence of PW5 was that he made a small nick ('torehan kecil') at the corner of aluminium cover of each slab but the chemist, PW3 very clearly said in the cross-examination by learned counsel for Ipin that the five slabs he received were nicely wrapped.

[14] The exact questions put to him at p. 42 of the appeal record vol. 1 were as follows:

S: Semasa memeriksa bungkusan SD1-SD5, bungkusan ini dibalut dengan pita pelekat dan kertas aluminium

J: Betul.

S: Adakah bungkusan-bungkusan dibalut dengan pita pelekat **dan kertas aluminium** dalam keadaan baik dan tiada kesan koyakan

J: Setuju.

S: Saya katakan pada pemeriksaan pada kelima-lima bungkusan dalam keadaan elok dan tidak dibuka oleh sesiapa melainkan encik

J: Setuju.

S: Bungkusan SD1-SD5 encik buka untuk tujuan analisa

J: Setuju.

S: Saya katakan bungkusan ini SD1-SD5 ada yang telah dibuka terlebih dahulu sebelum encik buka

J: Tidak setuju. (emphasis added)

[15] His insistence that the packages were properly wrapped, particularly in respect of the aluminium foil was very damning to the prosecution because it contradicted that of PW5 as stated earlier.

[16] Further, from the photographs of the exhs. (IDD26) as produced from the press conference held by PW5 on 7 January 2016, a day before the exhibits were sent to the chemist, there were not just a small nick on the aluminium foil cover of two of the slabs of cannabis but a big one (see p. 39 of appeal record vol 3). Now, although IDD26 was not formerly marked as an exhibit, but PW6 had admitted the authenticity of the same and the failure to do so was therefore not fatal to the issue raised. Based on these evidence, there was, in our view, a genuine reason to doubt the identity of the exhibits

produced. For the record, PW6 had been challenged in cross-examination that the exhibits sent to the chemist were not the ones seized on that day. This challenge, as well as the evidence referred to above, appears at p. 105 vol. 2 of the appeal record and is reproduced below:

S: Saya katakan kelima-lima ketulan dadah yang dihantar ke JKM ini bukanlah dadah yang terlibat dalam tangkapan OKT1 & 2

J: Tidak setuju.

S: Dalam kes ini ada dibuat sidang akhbar

J: Ada.

S: Bila

J: Rujuk ID siasatan dan keratan akhbar

Peguambela: Tidak perlu pada masa ini kerana keratan tiada dalam eksibit.

S: Rujuk Berita Harian Online

TPR: Bantah kerana tidak tahu punca daripada mana dan bukan terlibat dalam siasatan dan tiada siapa boleh sahkan salinan ini

En Khairil: Percaya saksi boleh sahkan kerana ada gambar saksi

J: Sahkan ini gambar saya.

Mahkamah: Teruskan.

S: Boleh baca kandungan repot muka surat 2-3

J: Gambar dan kandungan betul.

[17] The exact same points on the identity of the exhibits when ruled in favour of an accused person and had earned him an acquittal have been decided by the Federal Court and we were appraised of two of them by Ipin's counsel. In *Sia Pang Liong v. PP* [2012] 9 CLJ 848; [2013] 2 MLJ 490 this was what was crucially said by the court on this issue:

> [10] In this case, it is not true that the identity of the drug exhibits was not disputed by the defence. PW7 was cross-examined on this issue. At p 84 of the record of appeal, PW7 was asked:
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> Saya cadangkan barang-barang kes yang dirampas daripada OKT jika ada bukanlah barang-barang yang ada di Mahkamah hari ini.
>
> [11] Thus, the identity of the drug exhibits was being challenged by the appellant. **Once there is such a challenge, the prosecution bears the burden of proving beyond reasonable doubt that there are no gaps in the chain of evidence.** It is the burden of the prosecution to adduce evidence that the drug exhibits that were recovered from the appellant and that were sent to the chemist for analysis were the same drug exhibits that the appellant was charged with. (emphasis added)

18] Earlier, in *Yusri Pialmi v. PP* [2010] 6 CLJ 878; [2011] 4 MLJ 533 this was what the court similarly held:

> [11] We would like to categorically state here that the evidence adduced by the prosecution in the present case showed there is a reasonable defect in the identity of the case exhibit which is the subject matter of the prosecution against the appellant. In a criminal trial an accused person is permitted to take every available opportunity to reveal any defect in the prosecution's case (see the case of *Yeong Kia Heng v. Pendakwa Raya* [1992] 1 MLJ 327. **A defect with regard to the identity of the case exhibit in the present case to us is a serious matter. On this ground alone the appellant would succeed in his appeal.** (emphasis added)

[19] Hence, on the strength of the case authorities as cited above which we have no reason to distinguish, we have to discharge and acquit Ipin and Aliff for the safety of their convictions had been compromised. Their respective appeals were therefore allowed and the convictions and sentences passed by the learned Judicial Commissioner are set aside.